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In the Supreme Court of the United States

OCTOBER TERM, 1993

LAMBERT C. MIMS,
Petitioner,

–against–

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Under the Hobbs Act:

A. Whether a public official has committed extortion "under color of official right" when he has not personally obtained any property as a result of the alleged extortion scheme.

B. Whether a "quid pro quo" is a requirement of extortion "under color of official right" in cases that do not involve campaign contributions.

II. Pursuant to Rule 6(e)(4) of the Federal Rules of Criminal Procedure:

A. Whether the government must explain to the magistrate the reasons for its request when it seeks sealing of an indictment.

B. Whether it is legitimate to seal an indictment for the purposes of tolling the statute of limitations in order to continue an investigation against other defendants on unrelated charges.

III. Whether a defendant or his attorney must be permitted to interview the jurors after a verdict to determine whether they knew of an attempt to bribe a juror made during the trial by an employee of a co-defendant.

IV. In light of the Court's grant of certiorari in United States v. Tome (No.93-6892), whether this case should be remanded in the event the Court decides that a prior consistent statement is not admissible to rebut a fabrication if the statement was made after the declarant had a motive to fabricate.

PARTIES TO THE PROCEEDINGS IN THE COURT WHERE JUDGMENT IS SOUGHT TO BE REVIEWED

The parties in the court below were Lambert C. Mims, Charles S. Shaw, Ellis L. McDonald and Francis A. Wilkie, Jr., defendants-appellants, and the United States of America, appellee.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished, and is set forth in the appendix at App-1.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Eleventh Circuit was entered on December 15, 1993. (App-1) A timely petition for rehearing and suggestion for rehearing en banc was denied by order entered on February 11, 1994. (App-7) This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Hobbs Act, 18 U.S.C. §1951, provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or

> attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section...
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Rule 6(e)(4) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuances and execution of a warrant or summons.

United States District Court for

the Southern District of Alabama, Local Rule 12, provides, in pertinent part:

> Attorneys, parties, or anyone acting for them or on their behalf shall not, without filing formal petition therefor with the Court and securing the Court's permission, interrogate jurors, or alternative jurors, either in person or in writing, relative to cases on which they have served.

Rule 801(d)(1)(B) of the Federal Rules of Evidence provides, in pertinent part:

> Statements which are not hearsay. A statement is not hearsay if --
>
> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive....

STATEMENT OF THE CASE

For twenty years, from 1965 to 1985, petitioner Lambert C. Mims served

as a member of the City Commission of the City of Mobile, Alabama, and as the Public Works Commissioner. Pursuant to a local rotation system in effect at the time, while a Commissioner, Mims also served periodically as Mayor of Mobile. In 1988, after a brief stint in the private sector, Mims decided to run for mayor. The election was to take place in July of 1989.

On December 1, 1988, an indictment was returned in the United States District Court for the Southern District of Alabama that charged Mims, along with co-defendants Charles Shaw and Ellis McDonald, with three counts of violating the Hobbs Act. At the request of the Assistant United States Attorney, unaccompanied by any explanation, the Magistrate directed that that indictment be sealed.

Meanwhile, unaware that an indictment had been secretly filed,

Mims continued to campaign for office. Seven months later, on June 30, 1989, the same grand jury returned a thirty-five count superseding indictment.

The superseding indictment, filed just weeks before the upcoming election, included the identical three Hobbs Act counts as to Mims that were the basis of the earlier indictment. Count Two charged that McDonald, Shaw and Mims conspired to violate the Hobbs Act, 18 U.S.C. §1951, by obtaining for Shaw a percentage of ownership in Area Services, Inc., a company Gerald Godwin had formed in connection with a proposal he had submitted to the City of Mobile to build and operate a steam plant; and (2) by attempting to obtain from National Heritage Mortgage Corporation the right to make the decision as to what company would build the proposed steam plant. Counts Three

and Four alleged substantive Hobbs Act violations that mirrored those alleged extortion schemes. By the time the superseding indictment was filed, Count Two was no longer timely under the relevant statute of limitations.

The new indictment also included some thirty additional counts against McDonald, F. Lee Jackson, Jr., Francis A. Wilkie, Jr., and others, charging unrelated tax and mail frauds, and a RICO count against McDonald, Jackson, and Mims, which incorporated as racketeering acts many of the thirty-odd counts against McDonald and Jackson, as well as two of the Hobbs Act counts against Mims. RICO forfeiture was sought only against McDonald.

The trial began in January, 1990. The facts relevant to the alleged

extortion of Gerald Godwin[1] are as follows:

In the late 1970's and early 1980's, because of skyrocketing oil prices, the City of Mobile was approached with a proposal for constructing a steam generator plan that would convert garbage into steam energy. To be economically feasible, there had to be a purchaser for the steam generated by the plant, and the City and County of Mobile had to provide sufficient solid wastes for use as fuel.

In the early 1980's, Gerald Godwin, along with two other individuals, formed Trash Burning

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[1] Count Two of the indictment alleged a two prong conspiracy. The first prong involved Gerald Godwin. The second prong involved the alleged extortion of National Heritage Mortgage Corporation and was identical to Count Four, of which Mims was acquitted. The jury plainly convicted on Count Two solely on the basis of the alleged Godwin extortion.

Systems, Inc. ("TBS"), to build and operate a steam plant. TBS entered into a non-exclusive agreement with the Degussa Corporation to purchase steam generated by the proposed plant. Godwin then asked his minister for an introduction to Mims, and the two men began an acquaintance that lasted a number of years. TBS, however, did not obtain a commitment from the City to provide the necessary garbage, and, in January, 1983, TBS was dissolved.[2]

In October, 1983, the City publicly announced that it would accept proposals for building and operating a steam plant. Godwin formed Area

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[2] The government never charged that Mim's dealings with TBS were illegal in any fashion. It did contend that Mims had told the other principals of TBS to see McDonald, who owned a construction company, about building the plant, and that Mims arbitrarily withheld approval of the project. Mims maintained that he legitimately felt that the tipping fee (the fee the City would have to pay to deliver and dump the garbage) was too high.

Services, Inc. ("ASI"), and submitted a proposal that set forth his plan to use Degussa as the steam purchaser. ASI was a shell corporation -- no stock was issued, and it had no bank accounts and no assets other than a non-exclusive, contingent contract to supply steam to Degussa.

The City received a number of proposals, which were opened on November 7, 1983. Although ASI submitted the lowest proposal, an independent professional engineering firm the City had hired to evaluate the steam plant proposals reported that an even better proposal had been submitted by a company called Alabama Energy Recovery, Inc. ("AER"). AER was owned by the defendant Charles Shaw, a local businessman who had been friends with Commissioner Mims for years and had

been awarded other city contracts.[3]

The AER proposal set forth a plan to locate a steam plant at Stone Container Corp., which was financially attractive because, unlike Degussa, Stone Container was centrally located within the City of Mobile. As a result, transport costs would be much lower.

Nevertheless, Godwin believed that he had the better proposal because, he thought, Stone Container's energy needs were not sufficient to enable it to purchase enough steam to make the steam plant economically viable. A number of witnesses, however, testified that Stone Container was a viable candidate for steam plant energy. Indeed, earlier, a Stone Container Corp. official had contacted Mims to let him

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[3] A salesman for steam plant equipment testified that, on October 27, 1983, he met with Mims who referred him to Shaw as someone who was putting together the steam plant project.

know that his company was interested in having a steam plant located at its factory.

In their proposals, both Shaw and Godwin had named co-defendant McDonald's construction company as the company that would build the plant. After the proposals were opened, Shaw and McDonald met with officials at Stone Container. Mims was not present at this meeting and there was no evidence that he was aware of it. McDonald, apparently concerned about Stone Container's needs, decided that the steam plant had a greater chance of success if it was not built at Stone Container.

According to the government, the alleged extortion took place at a meeting on December 8, 1983. At that meeting, McDonald introduced Godwin to Shaw, and allegedly told both men that if a steam plant was going to be built,

he was going to build it. McDonald then advised the two men that they should work out the arrangements. After this "introduction," Shaw insisted that Godwin transfer to him 50% of ASI. Mims was not present at this meeting, there was no evidence that he was aware of it, and, as Godwin readily admitted, his name was not even discussed.

Over the next few weeks, Godwin attempted to convince both Shaw and Mims that AER's proposal was not feasible. Mims allowed AER until February 1, 1984 to put the project together. In the meantime, in January, 1984, Godwin transferred an interest in ASI to Shaw.

After Godwin had effectuated the transfer, on either January 30, 1984 or February 2, 1984, Godwin, Shaw and Mims

met for lunch.[4] Godwin testified that Mims asked both him and Shaw if their business was worked out with Godwin, and both said that it was. Mims then told Shaw to send a letter advising the City that Stone Container would not be the steam purchaser and that the contract should go to ASI.

On March 2, 1984, the City gave Godwin a letter of intent. Ultimately, however, the City of Mobile never

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[4] Mims denied attending a meeting with Godwin on either date. Godwin testified that the meeting took place on February 2d. His diaries, introduced by the government over objection that they were self-serving hearsay, (see Point IV, infra), also indicated that the meeting took place on that date. The government, over objection, was permitted to introduce Mims's appointment books that showed that he did not attend a meeting on February 2, but was at a lunch meeting with Shaw on January 30th. Although Godwin continued to maintain, even on rebuttal, that the meeting was on February 2, the government argued to the jury that it was on January 30, which, the government said, was significant because the City had given AER until February 1st to finalize its proposal.

awarded a contract to any company because oil prices dropped and the proposal for a steam plant was no longer economically desirable.

Godwin testified about a number of meetings and telephone calls with Mims. Yet he never testified that Mims ever told him he had to do business with Shaw in order to obtain the contract with the City, or that Shaw ever told him that he had to transfer an interest in ASI in order to secure Mims's approval. Nor did Godwin or anyone else ever testify that Mims obtained anything from Godwin or from anyone else in connection with the steam plant proposal.

On April 3, 1990, the jury returned its verdict. The jury acquitted Mims of Count One, the RICO count, and of Count Four, the Hobbs Act count involving National Heritage Mortgage Corporation, but convicted

Mims of Counts Two and Three, the two counts that dealt with the alleged extortion of Godwin.

On June 8, 1990, Mims was sentenced to two ten year terms of imprisonment, to be served concurrently, and was fined $10,000.00.

During the trial, while Mims was on the stand, a juror reported that someone who worked for McDonald had tried to influence his verdict. He told another juror about the incident. After questioning by the trial judge, the two jurors were excused. The trial judge then, and again later in the trial, questioned the remaining jurors, out of the presence of counsel, and reported to counsel that they were unaware of the incident.

After the trial, Mims learned that one of the excused jurors, in disregard of the judge's directions, had attempted to contact another juror.

Since a local rule prohibited Mims or his attorney from interviewing the jurors, Mims moved for permission to speak to the jurors to find out whether there had been any other contact, or whether they knew why two jurors had been excused, or, in the alternative, for an evidentiary hearing on whether the jury tampering incident adversely affected his right to a fair trial. On February 5, 1991, that motion was denied.

Mims appealed both his conviction and the denial of his post-trial motion to the Court of Appeals for the Eleventh Circuit. Although his appeal raised a number of substantial issues -- including, among others, whether the evidence against Mims demonstrated any criminal activity on his part, let alone a violation of the Hobbs Act; whether it is proper for the government to seal the indictment in order to toll

the statute of limitations; whether it was error to deny Mims's request to speak to the jurors or hold a hearing on the jury tampering incident; and whether the unrelated counts against McDonald were misjoined -- on December 15, 1993, the Court summarily affirmed the conviction without addressing any of the substantive issues, only correcting a minor sentencing error raised by McDonald. (App-1)

On February 4, 1994, the Eleventh Circuit decided United States v. Martinez, 14 F.3d 543 (11th Cir. 1994), which dealt with two of the issues raised by Mims -- the scope of the Hobbs Act and the standards for determining when a jury verdict has been tainted by outside influences. The parties promptly alerted the Court to the importance of Martinez, but, on February 11, 1994, the Court denied Mims's petition for rehearing and

suggestion for rehearing en banc. (App-7)

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE WHAT CONDUCT BY A PUBLIC OFFICIAL CONSTITUTES EXTORTION "UNDER COLOR OF OFFICIAL RIGHT"

Mims was convicted of violating the Hobbs Act,[5] and sentenced to ten years in prison, even though the jury was never told that to convict him of extortion "under color of official right" it had to find a "quid pro quo," and even though he "obtained" no "property" from the alleged extortion scheme. In essence, Mims was convicted of extortion because, according to the government's theory of the case, he used his office to steer a potential

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[5] The text of the relevant portions of the Hobbs Act, 18 U.S.C. § 1951, is set out at pps. 1-2 above.

government contract to a friend.[6]

This case takes the Hobbs Act where it has never gone before. The government was not required to, and did not prove, that Mims received any "property" directly or indirectly from the purported extortion victim or from his friend. Thus, the federal crime of extortion has now been defined, at least in the Eleventh Circuit, to include the use of a public office to benefit a friend at the expense of a third party. This crime is committed even when the public official has not been "paid off," even if the official's motive was to advance the public good, and even if the public may have benefitted by his actions.

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[6] In fact, even reading the evidence in the light most favorable to the government, the evidence showed at most that, instead of immediately awarding the steam plan contract to Godwin, Mims gave Shaw additional time to work out his proposal -- a proposal which an independent engineering firm had determined was the best.

While this case is extreme, the proper reach of the "official right" prong of the Hobbs Act has plagued the federal courts since the early 1970s, when the government first began aggressively using the Hobbs Act to attack public corruption at the state and local levels. See generally Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 Geo. L.J. 1171 (1977). Indeed, this Court has just recently resolved two of the many questions posed by the expansive use of the Hobbs Act.

In McCormick v. United States, 111 S.Ct. 1807 (1991), this Court held that a public official does not commit extortion "under color of official right" when he accepts a campaign contribution unless the government proves an explicit quid pro quo. In other words, receiving contributions is

a crime "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." Id. at 1816.

The following year, in Evans v. United States, 112 S.Ct. 1881 (1992), the Court held that "inducement" is not an element of the crime of extortion "under color of official right." Rather, to establish the crime "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." Id. at 1889.

A. Review Is Necessary To Decide Whether A Public Official Commits Extortion "Under Color Of Official Right" When He Does Not Obtain Property From Another

There is one indisputable fact in this case. Commissioner Mims obtained no property from either Godwin or Shaw as a result of the alleged extortion

scheme. Godwin, the alleged victim, transferred an interest in his company to Shaw, but he did not give anything to Mims to obtain his approval for the steam plant contract. Nor did Shaw, the alleged beneficiary of the extortion scheme, pay Mims to obtain his cooperation.

This case, therefore, raises an extraordinarily important question concerning the scope of the Hobbs Act: has a public official committed extortion "under color of official right" when he has neither obtained property from the alleged extortion victim nor otherwise benefitted from the alleged extortion scheme.[7]

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[7] The jury was charged as to both extortion through "fear of economic harm," and extortion "under color of official right."

In Griffin v. United States, 112 S.Ct. 466 (1991), this Court held that when a jury is charged on two theories, its verdict can be sustained even if one theory is not supported by sufficient evidence. However, the

Surely, he has not. The statute itself reads that the official must "obtain[] ... property of another ... under color of official right." 18 U.S.C. §1951(b). In McCormick, this Court defined "official right" extortion as "the receipt of money by an elected official under color of official right" in return for "an explicit promise or undertaking by the official to perform or not to perform an official act." 111 S.Ct. at 1816 (emphasis added). And in Evans, the Court repeatedly stressed that it is the unauthorized taking by the public

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Court reaffirmed that if one of the theories is legally deficient, the conviction must be reversed. 112 S.Ct. at 470. See also United States v. Martinez, 14 F.3d 543, 553 (11th Cir. 1994) (applying this rule to reverse a Hobbs Act conviction where jury charged incorrectly on "under color of official right" theory, but properly on "fear of economic harm" theory); United States v. Garcia, 992 F.2d 409, 416 (2d Cir. 1993) (same). Thus, if Mims conviction is legally invalid under the "official right" theory of extortion, it must be reversed.

official of money or property that is the gist of the crime. As the Court put it: "the statute merely requires of the public official that he obtain 'property from another, with his consent ... under color of official right.'" 112 S.Ct. at 1888 (emphasis added).

Reading the Hobbs Act, as the lower courts did here, to cover any use of public office to bestow a benefit on a third party to the detriment of another, even absent any payment or other benefit to the public official, creates a Hobbs Act of virtually boundless reach. Under this extraordinarily expansive view of the Hobbs Act, motive is of no moment. The public official may be acting for legitimate public purposes, yet he has still committed a federal crime.

Whenever, for example, an official recommends that a particular contractor

participate in a government contract because he has proven reliable in the past, if that contract could have been awarded to another bidder, the official has committed extortion since he has used his office to suggest one person over another. Likewise, whenever a public official steers a government contract to a minority contractor to the detriment of another, he has violated the Hobbs Act, even if the official genuinely believes that his efforts to promote minority businesses are consistent with his public duty. In short, every act of political patronage at every level of government and regardless of motivation is a potential federal crime. That cannot be what Congress intended.

This Hobbs Act prosecution of Mims even though he was not "paid" in return for a promise to take official action appears to be unprecedented. But if

this decision is allowed to stand, the federal government will view it as a green light for prosecuting other state and local officials for conduct that has never before been considered extortionate and has never before been subject to federal control. This Court should grant review to determine whether the "under color of official right" language of the Hobbs Act can be stretched to cover the type of official conduct at issue in this case.

B. Review Is Necessary To Resolve Whether A "Quid Pro Quo" Is Always A Requirement Of The "Under Color of Official Right" Prong Of The Hobbs Act

Assuming that the "official right" provisions of the Hobbs Act do cover a situation where the public official does not personally "obtain[] ... property from another," this case poses another important question not yet resolved by this Court -- that is, whether the government must prove a

quid pro quo outside of the campaign contribution context.

McCormick expressly left open that question. 111 S.Ct. at 1817, n.10. Although language in Evans suggested that a quid pro quo was required in all "official right" Hobbs Act cases, the issue was neither presented nor decided. This case, therefore, presents this Court with a perfect opportunity to resolve this important and open question.

The government argued in closing that the jury could convict if it believed that Mims either aided and abetted Shaw in extorting Godwin through "fear of economic harm," or that Mims extorted Godwin directly "under color of official right." (Tr. 9582-82) The jury was then charged very generally on both of these

theories of extortion.[8] The jury, however, was not instructed that to find Mims guilty under the "official right" theory of extortion it must find a quid pro quo. Thus, Mims might well

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[8] The instructions on the "official right" prong of extortion were remarkably brief:

> Extortion also includes the wrongful acquisition of property from someone else under color of official right.
>
> * * *
>
> Extortion under color of official right is the wrongful taking by a public officer of money or property not due him or his office whether or not the taking was accomplished by force, threats, or use of fear. The wrongful use of otherwise valid official power may convert a lawful action into unlawful extortion. So, if a public official misuses his office by threatening to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a threat would constitute extortion even though the official was already duty bound to take or withhold the action in question. (Tr. 10395-96)

have been convicted for the "wrongful use" of his "official power," (Tr. 10395-96), even though the jury did not find that he or Shaw obtained any property in return for "an explicit promise or undertaking ... to perform or not to perform an official act." McCormick, 111 S.Ct. at 1816. In other words, Mims might have been convicted for conduct which, we submit, is not and should not be a crime under the Hobbs Act.

Whether a quid pro quo is required for all "official right" Hobbs Act violations is a question that this Court must ultimately resolve. The federal courts are now grappling with this question. Two circuits have extended McCormick outside of the campaign contribution context. See United States v. Taylor, 993 F.2d 382 (4th Cir.), cert. denied, 114 S.Ct. 249 (1993); United States v. Garcia, 992

F.2d 409 (2d Cir. 1993). In contrast, in this case, the panel of the Eleventh Circuit simply ignored the "quid pro quo" requirement. Yet shortly after that panel decided this case, another panel of the Eleventh Circuit, in United States v. Martinez, 14 F.3d 543 (11th Cir. 1994), held that a quid pro quo is a requirement even when the payment to the public official was not a campaign contribution. Despite this ruling, when Mims sought reconsideration of his appeal in light of Martinez, his request was denied.[9] Thus, within the Eleventh Circuit itself, there is a conflict on this issue.

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[9] Mims was convicted before McCormick was decided. However, both McCormick and Evans had been decided when the Eleventh Circuit heard the case, and both were specifically cited in the petition for rehearing after it became evident, in light of Martinez, that the Eleventh Circuit would require a "quid pro quo" even in cases not involving campaign contributions.

Undoubtedly, the government will continue to prosecute public officials under the Hobbs Act in cases that do not involve campaign contributions. Undoubtedly, there will continue to be inconsistent rulings on what is required to prove extortion "under color of official right." This Court should grant review in this case to finally decide whether the government must prove a quid pro quo in all "official right" Hobbs Act cases.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE WHETHER THE GOVERNMENT MUST JUSTIFY ITS REQUEST WHEN IT SEEKS SEALING OF AN INDICTMENT AND WHETHER IT IS LEGITIMATE TO SEAL AN INDICTMENT FOR THE PURPOSE OF TOLLING THE STATUTE OF LIMITATIONS

This case squarely poses two important questions concerning the sealing of indictments pursuant to Rule 6(e)(4) of the Federal Rules of

Criminal Procedure:[10] (1) must the government provide a reason when it asks a magistrate to seal an indictment; and (2) is it legitimate to seal an indictment for the purpose of tolling the statute of limitations to continue an investigation of another defendant on unrelated matters.

This Court has never had occasion to address the proper procedures to be followed when the government asks that an indictment be sealed. The Courts of Appeals, however, have given the government virtual carte blanche to seal an indictment for virtually any reason and have held that such sealing tolls the statute of limitations.[11] In

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[10] The text of Rule 6(e)(4) is set out at page 2 above.

[11] See, e.g., United States v. Sharpe, 995 F.2d 49 (5th Cir.), cert. denied, 114 S.Ct. 234 (1993); United States v. Richard, 943 F.2d 115 (1st Cir. 1991); United States v. Larkin, 875 F.2d 168 (8th Cir. 1989); United States v. Srulowitz, 819 F.2d 37 (2d Cir.), cert. denied, 484 U.S. 853

the Eleventh Circuit that is true even when, as here, the only reason for sealing the indictment is to toll the statute of limitations. See United States v. Edwards, 777 F.2d 644 (11th Cir. 1985), cert. denied, 475 U.S. 1123 (1986). Moreover, a number of Circuits have allowed the government to seek the sealing of an indictment without even articulating to the magistrate any reason for the request. United States v. Srulowitz, 819 F.2d 37 (2d Cir.), cert. denied, 484 U.S. 853 (1987); United States v. Larkin, 875 F.2d 168 (8th Cir, 1989); United States v. Sharpe, 995 F.2d 49 (5th Cir.), cert. denied, 114 S.Ct. 234 (1993).

We submit that the appellate courts have been uniformly wrong -- that they have misread and misapplied Rule 6(e)(4) and, in doing so, have

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(1987); United States v. Ramey, 791 F.2d 317 (4th Cir. 1986).

given the government unbridled power to dispense with the important protections of the statute of limitations.

This case provides a glaring example of the impropriety of the current practice, of the unfair impact it has on a defendant's rights, and of the pressing need for this Court's intervention.

The government began investigating the alleged extortion in connection with the steam plant proposal back in 1984. By early 1986, a grand jury had been convened and the government had the evidence it would later introduce against Mims. But the government did not indict Mims. The government, instead, began an unrelated investigation of Ellis McDonald.

After a delay of three years, on December 1, 1988, just the day before the statute of limitations was to expire on one of the counts, the

government filed a relatively simple three count indictment against Mims and two co-defendants, Charles Shaw and Ellis McDonald, charging them with three counts of violating the Hobbs Act, all involving the steam plant proposal. The government, without providing any reason for the request, asked the Magistrate to seal the indictment. The Magistrate granted the request and the indictment was sealed.

The government then continued its massive investigation of McDonald, F. Lee Jackson, Jr., Francis A. Wilkie, Jr., and several other individuals, with the intent of prosecuting them for RICO, tax, and mail fraud violations. On June 30, 1989, seven months later, upon the conclusion of that investigation -- an investigation even the government has acknowledged had nothing to do with Mims -- a superseding indictment was filed.

This new indictment added some thirty counts involving McDonald, Jackson, Wilkie and others. Those thirty counts did not mention Mims and were unrelated to the Hobbs Act violations alleged in the original indictment. The government also added one RICO count containing as predicate acts, or subsets of predicate acts, virtually all of the thirty counts against McDonald and Jackson. The RICO count did name Mims, but charged him only with two predicate acts identical to the Hobbs Act violations contained in the first indictment.[12]

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[12] Mims moved to dismiss the indictment pursuant to Rule 8(a) of the Federal Rules of Criminal Procedure on the ground that the thirty counts added to the indictment were misjoined, or, in the alternative, asked that a severance be granted pursuant to Rule 14. The motion was denied and the Court of Appeals affirmed without opinion. We submit that joinder was improper and that sealing the indictment to gain time to join thirty unrelated counts to a three count indictment was a calculated effort to prejudice Mims by linking him with the abundant criminal

By the time the superseding indictment was filed, the statute of limitations had run on Count Three of the indictment that charged Mims with extorting Godwin -- the only substantive Hobbs Act violation of which he was ultimately convicted.[13] In addition, in the intervening months, a critical witness, Gurney Owens, who had testified before the grand jury, and whom Mims expected would provide exculpatory testimony for him at trial,

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activity charged against McDonald.

[13] Mims was also convicted of Count Two, which, as already noted, alleged a two-pronged Hobbs Act conspiracy. That count was technically timely, but only because of the allegations relating to National Heritage Mortgage Corp. Those allegations mirrored exactly Count Four of the indictment, a substantive Hobbs Act violation of which Mims was acquitted. Thus, although the jury convicted Mims of Count Two, it plainly did so on the basis of the allegations which were time barred when the superseding indictment was filed.

Mims moved to dismiss <u>all</u> the counts of the indictment for preindictment delay and raised the denial of that motion on appeal.

suffered a stroke and became unavailable to testify at trial. His inculpatory out-of-court hearsay statements, including his grand jury testimony which had not been subjected to cross-examination, was nonetheless admitted at trial.

Mims moved to dismiss the superseding indictment on the ground of prejudicial preindictment delay and on the further ground that certain of the charges were barred by the statute of limitations. Mims argued that since the indictment had been improperly sealed, the statute was not tolled. The motion to dismiss was denied, and the Eleventh Circuit, although it had never addressed whether the government must set forth its reasons for seeking sealing at the time it makes its request, summarily affirmed without addressing this unresolved issue.

A. Review Is Necessary To Determine Whether The Government Must Articulate To The Magistrate The Reason Why It Seeks Sealing Of The Indictment

Rule 6(e) provides that the magistrate "may" (not shall) order the indictment to be sealed. Presumably, this means that the magistrate has discretion to either grant or deny the government's request. Yet, under the body of law that has developed in the courts, the government need not tell the magistrate why it wants the indictment to be sealed. The magistrate is to exercise his or her discretion with literally no information on which to base a decision. And, remarkably, even this uninformed exercise of discretion is to be afforded "great deference." See, e.g., Srulowitz, 819 F.2d at 41; Sharpe, 995 F.2d at 52. But see United States v. Maroun, 699 F.Supp. 5, 6 (D. Mass. 1988) (recognizing that a request to seal an indictment cannot be

"addressed to the sound discretion of the magistrate if she is not informed as to the reason for the request or the facts in support of it").

Congress gave the magistrate -- and not the government -- the discretion to direct the sealing of an indictment. But a magistrate can only exercise discretion if he or she is provided with facts sufficient to enable an informed decision to be made. Otherwise, the magistrate is nothing more than a rubber stamp for the government. Put another way, routinely granting a government request to seal an indictment without regard to the reason for the request or the underlying facts is not an exercise of discretion. It is ministerial act to which no deference should be paid.[14]

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[14] Indeed, in Srulowitz, the Court, in one breath, referred to the sealing as "but a ministerial act," yet, in the next breath, concluded that the magistrate's decision to seal should

According to the lower courts, there is no need for the government to explain to the magistrate why sealing is requested because the defendant is permitted to challenge the sealing once an unsealed indictment is filed. In the oft-quoted words of the Second Circuit, "A defendant's right to challenge the propriety of the sealing is fully protected by affording him the right to a hearing after the indictment is opened to public inspection." Srulowitz, 819 F.2d at 41.

That is not true. If the government is required to justify its request in the very first instance, the magistrate, considering the facts, may decide that the reason proffered is pretextual or illegitimate. The government then has the choice of

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"of course" be accorded "great deference." 819 F.2d at 41.

filing the indictment, unsealed.[15] But once the sealing has been ordered, the defendant is in the unenviable position of asking the court to dismiss charges against him, with prejudice, on the ground that they are time-barred. Worse still, at this stage, the defendant must overcome a decision, however uninformed, by a judicial officer to whom "great deference" is owed. Rarely, if ever, will that exercise of "discretion" be disturbed.

A sophisticated prosecutor will not offer any reason why a request is being made to seal the indictment if no

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[15] If the magistrate grants the request, after considering the facts and circumstances, there is a reason why that exercise of discretion should be respected. As Judge Friendly explained in United States v. Southland Corp., 760 F.2d 1366, 1380 (2d Cir.), cert. denied, 474 U.S. 825 (1985), the government "should be able, except in the most extraordinary cases, to rely on ... [the magistrate's] decision rather than risk dismissal of an indictment, the sealing of which it might have been willing to forego...."

explanation is necessary. Yet requiring the government to explain the reasons for its request is the only way the magistrate can exercise discretion about whether the request should be granted. The current and accepted practice has in effect rewritten Rule 6(e)(4) so that it is the government, and not the magistrate, who decides whether an indictment is to be sealed. This Court should grant review to rectify this clear misreading of the Rule.

B. Review Is Necessary To Determine Whether It Is Legitimate To Seal An Indictment For The Purpose of Tolling The Statute Of Limitations

Rule 6(e)(4) speaks of sealing an indictment "until the defendant is in custody or has been released pending trial." Nevertheless, the courts have held that an indictment may be sealed "where the public interest requires it," or "for sound reasons of policy." Southland, 760 F.2d at 1379, 1380. In

other words, an indictment may be sealed for any "legitimate" reason. Larkin, 875 F.2d at 170-171.

While the lower courts have been uniformly tolerant of the government's decision to seal indictments, only the Eleventh Circuit has thus far made clear that it is "legitimate" for the government to do what was done here: to seal an indictment for the sole purpose of tolling the statute of limitations against one defendant in order to continue an investigation of other defendants on unrelated charges. In the Eleventh Circuit, it is "legitimate" to seal an indictment not to locate a defendant's whereabouts, not to prevent him from fleeing, not to protect witnesses, and not to protect against early and potentially harmful media coverage, but precisely to deprive the defendant of the protections of the statute of

limitations. If that is a "legitimate" purpose, then the statute of limitations has lost all meaning.[16]

Prior to arrest, a defendant has no Sixth Amendment right to a "speedy" disposition of his case. United States v. Marion, 404 U.S. 307 (1971). Instead, "the law has provided other mechanisms to guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge." Id. at 322. Chief among those mechanisms, is the "applicable statute of limitations." Id.

Statutes of limitations are the "primary guarantee against bringing stale criminal charges," and "provide

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[16] At least one district court has concluded that it is not a legitimate purpose to seal an indictment in order to continue an investigation of other, unrelated charges, even when, unlike here, those new charges are against the defendant. United States v. Rogers, 781 F.Supp. 1181 (S.D. Miss. 1991).

predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." Id. See also United States v. Lovasco, 431 U.S. 783, 788 (1977). As the Court explained in Toussie v. United States, 397 U.S. 112, 114-15 (1970):

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.

Under the Eleventh Circuit's rule, since the government can easily

circumvent the statute of limitations, a defendant no longer has a "mechanism" to guard against the prejudice suffered by virtue of pre-arrest, pre-indictment delay. All the government must do is ask the magistrate to seal the indictment and it will be sealed -- here, for a period of seven months. The government then can continue its investigation at its leisure -- an investigation that, as this case shows, need not even be directed against the indicted defendant. Meanwhile, as happened here, the charges become stale, witnesses become unavailable, and memories fade.

If it is "legitimate" to seal an indictment in order to toll the statute of limitations, then the statute of limitations is of little consequence. Review should be granted so that this Court can restore the statute of limitations as the defendant's "primary

guarantee" against pre-arrest, pre-indictment delay.

III.

THIS COURT SHOULD GRANT REVIEW TO SET GUIDELINES ON WHEN A COURT MUST PERMIT POST-VERDICT INTERROGATION OF JURORS BY A DEFENDANT

The United States District Court for the Southern District of Alabama, like many jurisdictions throughout the country, has a rule, Local Rule 12,[17] prohibiting a defendant or his attorney from interrogating the jurors after the

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[17] The text of Local Rule 12 is set out at page 3 above.

Similar rules are in effect elsewhere. See, e.g., D.C. Colo. L.R. 47.2; D. Conn. Civ. Rule 12(e); Fl. R. Bar Rule 4-3.5; C.D. Ill. Gen. Rule 1.11; N.D. Ind. L.R. 47.2; S.D. Ind. L.R. 47.2; D. Kan. Gen. Rule 123; La. R. D.Ct. Gen. Rule 7; Dist. Ct. Rules D. Miss., Gen. Rule 1(b)(4); N.H. Super. Ct. Rule 77-B; D.C. Rules S.D. Ohio, L.R. 47.1; U.S.D.C. Rules N.D. Okl., L.R. 47-2 and L.C.R. 1.2; Or. R. U.T.C.R. 3.120; Tenn. U.S.D.Ct. W.D. Rule 19; Tenn. U.S.D.Ct. M.D. Rule 12(b); Tenn. U.S.D.Ct. E.D. Rule 48.1; W.V. U.S.D.Ct. S.D. Rule 3.02; Tx. U.S.D.Ct. E.D. Rule 10; Ut. U.S.D.Ct. L.R. Rule 3.15.

trial without the Court's permission. These rules are intended to protect jurors from post-verdict harassment. But, as this case demonstrates, however salutary these rules may be in principle, they can inhibit even reasonable and justifiable attempts to determine if external influences adversely affected the deliberative process.

This Court has never examined the validity of rules such as Local Rule 12. Clearly, strict application of these rules can have a serious impact on a defendant's ability to show that his trial was prejudiced by efforts to influence the jury's verdict. This case, therefore, provides an opportunity for this Court to address the circumstances under which courts must permit some form of post-verdict questioning of the jurors by a defendant or his attorney.

The pertinent facts are these: While Mims was on the stand, one of the jurors, Clyde Byrd, advised the court that he had been improperly contacted by someone who he believed was acting on behalf of defendant McDonald. The judge promptly questioned Byrd, in the presence of all counsel, and Byrd stated that a man named Levi Hopkins, Jr., who he knew worked for McDonald, and who had been present in the courtroom on a few occasions, had come to his home the day before, asked him some questions about the case, and then indirectly offered him a bribe.[18]

The morning after the bribe attempt, while in the jury room, Byrd told another juror, John Michael Etheridge, about the incident. A number of jurors were sitting at the same table when he and Etheridge

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[18] According to Byrd, Hopkins offered to help his church build new pews.

discussed this incident. The court then questioned Etheridge, in the presence of counsel, and the two men were excused with instructions not to discuss the matter with anyone. (R. 6373-6419)

After Byrd and Etheridge were excused, the court questioned the remaining jurors, this time outside of the presence of counsel. All the jurors denied knowing why Byrd and Etheridge were excused.[19] The court denied several defense counsel motions for a mistrial or for a severance. (R. 6434-36)

Towards the end of the trial, the court once again brought each of the

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[19] One juror told the court that she had heard Etheridge commenting that "...if he [Mims] didn't have something to hide, he would have revealed it [referring to Mims's desk calendars]." (R. 31-6429). Although this comment indicated that the jurors were improperly discussing the case prior to deliberations, the court did not report this to counsel.

jurors in for questioning, again outside of the presence of counsel, and over defense counsel's strenuous objections. (R. 9661-82)[20] The court then reported back to counsel that there was no indication that any juror knew anything about any outside contacts. (R.9683)[21]

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[20] The judge asked four questions of the jurors: (1) Have you been able to avoid the publicity about this case? (2) Have you been able to prevent and avoid any outside influences to you either directly or indirectly, which would in any way interfere with your ability to render a verdict based just on the evidence in this case? (3) Has anyone in anyway attempted to influence your decision one way or the other in arriving at a verdict in this case? (4) Do you know of any outside contact that's been made to encourage you or any other juror to vote one way or the other in arriving at your verdict? (R.9667-83) These questions, however well-intentioned, implied that there had been attempts to "interfere with [the jury's] ability to render a verdict," or to "influence [the jury's] decision," or to "encourage [the jury] to vote one way."

[21] In fact, one juror, in response to the question about a "any outside contact" responded nervously, "Not me. I haven't you know. No one's said anything to me about it." When the

Since the jury was not sequestered, there was a clear danger that the jurors would hear about the tampering incident. The trial judge himself acknowledged that there was little chance that the other jurors would not learn of what had happened. As he put it, "Here is the problem we are going to run into, y'all. We excuse both of these jurors, you know it is liable somehow to become public knowledge as to why. And I am certainly sure nobody in this room and none of the defendants themselves are going to disclose it publicly, but things have an amazing way of getting out." (R.6386)

To make matters worse, on March 30, 1990, just prior to deliberations,

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court then asked if the juror knew of "anybody attempting to contact any other juror?," the juror equivocated, "Oh, no. I don't know them other than here, so, no, they hadn't mentioned it to me." (R. 9681-82)

Levi Hopkins was indicted.[22] The jury rendered its verdict in this case on April 3, 1990, just a few days after the Hopkins indictment was filed in open court.

After the trial, Mims learned that ex-juror Etheridge had tried to contact one of the trial jurors, but that she had said she was too busy to talk to him. The juror had not reported Etheridge's contact to the trial court. Nevertheless, since Etheridge's attempt to contact a juror was in disregard of the judge's admonition, Mims believed that further investigation was necessary.

Local Rule 12 of the Rules of the United States District Court for the

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[22] The trial judge had also indicated that he would be "concerned" over the impact an arrest of Levi Hopkins might have on the trial. (R 6433) Hopkins plead guilty to jury tampering. After this trial, McDonald was indicted for conspiring to influence a juror, was tried, and was acquitted.

Southern District of Alabama, however, prohibited any communication with the jurors without leave of the District Court. Mims therefore moved for leave to speak to the jurors to find out if they had learned why Byrd and Etheridge had been excused, or, in the alternative, for a hearing on whether the bribe attempt had had a prejudicial impact on his trial. The district court denied the motion, and the Eleventh Circuit, again without addressing the issue, summarily affirmed.

Ordinarily, there are compelling policy considerations that support limitations on attempts to impeach a jury's verdict. See Tanner v. United States, 483 U.S. 107 (1987). But, as this case illustrates, there are extraordinary situations where those policy considerations are outweighed by the need to ensure that a defendant has

received a fair trial.

It is difficult to imagine anything more harmful to a defendant than having the jurors believe that he, or someone with whom he has been linked, has attempted to influence their verdict. As this Court has recognized, "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, presumptively prejudicial." Remmer v. United States, 347 U.S. 227, 229 (1954).

Whether Mims made a showing sufficient to trigger a full-scale post-verdict evidentiary hearing is not the issue here. The only issue is whether, under the circumstances presented here, Mims or his counsel could have been precluded from

questioning the jurors after trial.[23] Had such questioning been permitted, Mims might well have discovered that other jurors knew why Etheridge and Byrd had been discharged -- that the bribery attempt had become "public knowledge," as the trial judge himself feared it would. Mims would then have been entitled to an evidentiary hearing on whether the incident prejudiced his trial.

Rules such as Local Rule 12 implicate important constitutional concerns, including the defendant's First Amendment right of free speech and Sixth Amendment right to a fair

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[23] The District Court could have protected the jurors from harassment while still allowing some form of post-verdict interrogation. For example, the court could have limited the questions that were to be asked to those related to the bribery attempt and its impact on the jurors, or it could have required the questions to be submitted beforehand to the court, or it could have required only written questions.

trial. But regardless of whether those rules are constitutional on their face, they cannot validly be applied when there is good reason to believe that a trial may have been tainted by a bribery attempt. There are no existing standards to guide the lower courts in deciding whether or not to allow post-verdict questioning of the jurors. This Court should grant review to establish guidelines on when post-verdict interviews with the jurors must be permitted.

IV.

SINCE THIS CASE POSES THE QUESTION FOR WHICH CERTIORARI WAS GRANTED IN UNITED STATES V. TOME, IT SHOULD BE REMANDED IN THE EVENT THE COURT DECIDES THAT A PRIOR CONSISTENT STATEMENT IS NOT ADMISSIBLE IF THE MOTIVE TO FABRICATE EXISTED BEFORE THE STATEMENT WAS MADE

During the government's rebuttal case, the government was permitted, over objection, to admit into evidence documents that were referred to as

Godwin's project "diaries." (R. 9178-89, Govt. Exhs. 27 and 27A) The project "diaries" were admitted pursuant to Rule 801(d)(1)(B) of the Federal Rules of Evidence as prior consistent statements admissible to rebut a charge of recent fabrication.[24]

During the government's case-in-chief, Godwin admitted that he had prepared the project "diaries" after he had decided that he would not go through with a deal with Shaw and in anticipation of litigation. The defense argued that the diaries were self-serving hearsay and were not admissible under Rule 801(d)(1)(B) since they were prepared after Godwin had a motive to fabricate. That is the so-called majority rule. See Graham, Handbook of Federal Evidence, §801.12 (3d ed. 1991) But, as the government

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[24] The text of Rule 801(d)(1)(B) is set forth at page 3 above.

argued to the trial court (R.9180), and again on appeal, under the minority rule of the Eleventh Circuit, a prior consistent statement is admissible under Rule 801(d)(1)(B) even though the declarant had a motive to fabricate when the statement was made.

Just recently, in United States v. Tome, 114 S.Ct. 1048 (February 22, 1994) (No. 93-6892), granting certiorari to 3 F.3d 342 (10th Cir. 1993), this Court granted certiorari to resolve the conflict in the Circuits on this issue. Tome poses the very question that Mims raised on his appeal -- is a prior inconsistent statement admissible to rebut a charge of fabrication even though it was made after the declarant had a motive to fabricate.

Godwin's project "diaries" were admitted pursuant to an interpretation of Rule 801(d)(1)(B) that this Court

may reject. We therefore respectfully request that this case be held by this Court until such time as it resolves the issue posed in Tome. In the event that the Court rejects the Eleventh Circuit's rule and holds that a prior consistent statement is admissible only if it precedes the motive to fabricate, this case should be remanded to the Eleventh Circuit for reconsideration and further briefing in light of the Court's decision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

Dated: May 6, 1994
New York, New York

A P P E N D I X

[DO NOT PUBLISH]

RECEIVED
DEC 17 1993
U.S. DIST. JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-7436

D.C. DOCKET NO. CR89-00105-B

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 15 1993
MIGUEL J. CORTEX
CLERK

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ELLIS L. McDONALD, LAMBERT C. MIMS, CHARLES S. SHAW, FRANCIS A. WILKIE, JR.,

Defendants-Appellants.

NO. 91-7145
D.C. DOCKET NO. CR89-00105-CB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES S. SHAW, FRANCIS A. WILKIE, JR., ELLIS L. McDONALD, LAMBERT C. MIMS,

Defendants-Appellants.

NO. 91-7333
D.C. DOCKET NO. CR89-00105-CB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LAMBERT C. MIMS,

Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Alabama

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(December 15, 1993)

Before BIRCH, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

I.

This is a complex criminal case involving four defendants and twenty-nine issues raised on appeal. The record demonstrates that the defendants were charged with numerous criminal violations including, among other things, racketeering, extortion, conspiracy to defraud, fraud through

the use of the mails, obstruction of justice and various tax charges. The case was tried to a jury in the United States District Court for the Southern District of Alabama. The trial lasted approximately two and a half months. With the exception of defendant Shaw, who was convicted on both of the charges made against him, the remaining defendants were convicted of some charges, but acquitted of others. Each defendant appeals his conviction. Additionally, defendant McDonald appeals his sentence and the denial of his post-verdict motion.

II.

During the trial the government presented massive amounts of evidence through witnesses and documents that the defendants were involved in an extortion referred to as "The Steam Plant Extortion," fraud and bribery of

the Mobile Water Service System, tax fraud, and obstruction of justice. After carefully reviewing the massive record in this case, and after reading the briefs and having the benefit of oral argument, we are persuaded that there is no merit to any of the issues the defendants present in this appeal concerning their convictions. Therefore, the convictions of each defendant are summarily affirmed.

III.

Defendant McDonald argues that, in sentencing[1] him on the four counts[2] subject to a sentencing guidelines sentence, the district court improperly added two levels to the adjusted offense level for obstruction of justice based solely on the fact that

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[1] Ellis McDonald is the only defendant to appeal his sentence.

[2] Counts One, Twenty-seven, Twenty-eight and Thirty-five.

McDonald had been indicted for tampering with the jury. In its brief, the government concedes that, pursuant to previous holdings of this court, the district court is required to make findings, based upon a preponderance of the evidence, and cannot base its findings solely on the allegations contained within an indictment. See United States v. Andrews, 953 F.d 1312 (11th Cir. 1992); United States v. Castalanos, 904 F.2d 1490, 1495 (11th Cir. 1990). Accordingly, we vacate McDonald's sentence and remand his case to the district court for resentencing on Counts One, Twenty-seven, Twenty-eight and Thirty-five.[3]

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[3] We also observe from the record that the adjusted offense level used at sentencing was incorrectly determined, by a mistake in the addition, to be twenty-three. The base offense level was determined to be nineteen. Defendant McDonald then received a four level increase for role in the offense and a two level increase for

AFFIRMED in part, VACATED in part and REMANDED for resentencing.

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obstruction of justice. These figures result in a total adjusted offense level of twenty-five instead of twenty-three. The district court should correct this error upon remand.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 11 1994
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-7436

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ELLIS L. McDONALD, LAMBERT C. MIMS, CHARLES S. SHAW, FRANCIS A. WILKIE, JR.,

Defendants-Appellants.

NO. 91-7145

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES S. SHAW, FRANCIS A. WILKIE, JR., ELLIS L. McDONALD, LAMBERT C. MIMS,

Defendants-Appellants.

NO. 91-7333

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LAMBERT C. MIMS,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: BIRCH, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5),

the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Joel F. Dubina
UNITED STATES CIRCUIT JUDGE
ORD-42 (9/91)

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No. 93-1805

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

LAMBERT C. MIMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, to establish that petitioner violated the Hobbs Act, 18 U.S.C. 1951, the government had to prove that he received property or other tangible benefit from his extortionate conduct.

2. Whether the district court committed plain error in instructing the jury on the elements of a Hobbs Act violation.

3. Whether it was improper for the magistrate to seal the original indictment under Fed. R. Crim. P. 6(e)(4).

4. Whether the district court erred in admitting the diaries of a government witness into evidence.

5. Whether the district court abused its discretion when it denied petitioner's post-trial motion for a hearing on jury tampering and for permission to interrogate the jurors.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is unpublished, but the judgment is noted at 12 F.3d 217 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1993. A petition for rehearing was denied on February 11, 1994. Pet. App. 7-9. The petition for a writ of certiorari was filed on May 10, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Alabama, petitioner was convicted of extorting property from another "under color of

official right" (Count 3) and conspiring to do so (Count 2), both in violation of the Hobbs Act, 18 U.S.C. 1951.[1] He was sentenced to two concurrent terms of ten years' imprisonment and fined $10,000. The court of appeals affirmed. Pet. App. 1-6.

1. Petitioner used his position as a City Commissioner of Mobile, Alabama, to induce Gerald Godwin to transfer part of his ownership interest in a company to Charles Shaw, petitioner's close friend and business associate.

In October 1980, Trash Burning Systems, Inc. (TBS), was formed to build and operate a plant in Mobile County, Alabama, that would generate steam by burning solid waste. Godwin was a stockholder and financial backer of TBS. TBS entered into a contract with Degussa Corporation under which Degussa agreed to buy the steam that would be generated by the proposed plant. Thereafter, two TBS owners met with petitioner, then one of Mobile's three City Commissioners, to gain his support for the project and the City's commitment to supply solid waste to the project. Petitioner told the TBS owners to contact Ellis McDonald about constructing the proposed steam-generating plant. McDonald owned several construction companies and had, in the past, done construction work for petitioner without billing him for it. Ultimately, petitioner refused to commit the City's solid waste to TBS, and, in January 1983, TBS was dissolved. Gov't C.A. Br. 13-15 & nn.7-8.

In October 1983, petitioner announced that the City would accept proposals for disposing of the City's solid waste. Godwin formed Area Services, Inc., which submitted a proposal to use the solid waste at a steam-generat-

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[1] Petitioner was acquitted of one substantive Hobbs Act charge (Count 4), and of conducting the affairs of an enterprise through a pattern of racketeering activity (Count 1).

ing plant and sell the steam to Degussa. Alabama Energy Recovery, Inc. (Alabama Energy) submitted a competing proposal to build a steam-generating plant at, and sell the steam to, the Stone Container Corporation. Alabama Energy was owned by Charles Shaw, a close personal friend and business associate of petitioner. Petitioner wanted Shaw to be the developer of the steam plant project, but an engineer told petitioner that it was not economically feasible to locate a steam plant at the Stone Container Corporation. Studies confirmed that Stone Container's energy usage and costs were too low to make Alabama Energy's proposed project economically feasible. Gov't C.A. Br. 15-16 & n.9, 19.

In late November 1983, Shaw, McDonald, and others met with Stone Container officials to tell them that the City had unofficially selected Shaw to head the steam-plant project and that McDonald would build the plant. It was also determined at that meeting, however, that the proposal submitted by Shaw's company (Alabama Energy) to sell all of the steam to Stone Container was not economically feasible. Gov't C.A. Br. 19-20.

In December 1983, Godwin went to McDonald's office, where McDonald introduced Godwin to Shaw. McDonald told the two men that, if any steam plant were built in Mobile, he was going to build it and Godwin and Shaw could own it. McDonald told Godwin and Shaw to work out the ownership arrangements between themselves. Shaw then took Godwin to Shaw's office and said that, if any steam plant were built in Mobile, he was going to own half of it. Shaw told Godwin that he should be satisfied to get "50% of something" rather than "100% of nothing." Godwin did not, however, agree during that meeting to give Shaw any interest in Godwin's company, Area Services. Gov't C.A. Br. 20.

In early January 1984, Godwin was again called to McDonald's office, where Shaw was waiting. Shaw demanded that Godwin cede 40% of Area Services to Shaw and 20% of it to an associate of Shaw's. This time, Godwin agreed. Gov't C.A. Br. 21-22.

On January 30, 1984, Godwin met Shaw and petitioner at a restaurant. At the meeting, petitioner asked Shaw if he had worked things out with Godwin, to which Shaw replied "yes." Petitioner told Shaw to send him a letter stating that Stone Container could not purchase the steam from the proposed project (as contemplated under Alabama Energy's proposal) and that the contract for the project should go to Area Services. Shaw did so. Two days later, petitioner told Godwin to send him a letter of intent to use McDonald's company to construct the plant. Godwin did so. On February 27, 1984, petitioner issued a press release stating that the City was giving the steam plant project to Area Services. Gov't C.A. Br. 22-23.

During 1984 and 1985, Godwin sought to arrange financing for the steam-plant project and to obtain commitments from the City and County of Mobile to supply solid waste to the project. The National Heritage Mortgage Corporation (NHMC) eventually took the lead from Godwin in arranging the financing. Shaw and McDonald made it clear to Godwin that, unless NHMC assured McDonald that his company would build the steam plant, neither the City nor the County would make commitments to supply their solid waste. Although the commitments were ultimately made, the steam plant was never built because a sharp fall in oil prices made it economically unfeasible. Gov't C.A. Br. 24-28 & n.18.

2. On December 1, 1988, a three-count indictment was returned against petitioner, McDonald, and Shaw in the Southern District of Alabama. Count 1 charged that, from October 1980 through October 1985, the three defendants

conspired to violate the Hobbs Act by (1) obtaining for Shaw an ownership interest in Area Services with Godwin's consent, which had been "induced by the wrongful use of threatened and actual fear, including the threatened and actual fear of economic and financial loss, and under color of official right"; and (2) attempting to obtain from NHMC the right to decide what company would build the proposed steam plant, by the use of threatened and actual fear of economic and financial loss, and under color of official right.[2] Count 2 charged that

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[2] Count 1 alleged:

> It was a part of the conspiracy that the defendants did obtain for [Shaw] certain property from Gerald Godwin, namely, a percentage of ownership in Area Services, Inc., with the consent of [Godwin], such consent being induced by the wrongful use of threatened and actual fear, including the threatened and actual fear of economic and financial loss, and under color of official right, in that the defendants, both subtly and overtly, by actions, inactions and statements, made [Godwin] understand that Area Services, Inc. would not receive the commitments from the City of Mobile necessary to make the construction and operation of a steam plant possible for Area Services, Inc. unless and until Gerald Godwin gave [Shaw] a percentage of ownership in Area Services, Inc.
>
> It was further a part of the conspiracy that the defendants attempted to obtain certain property of [NHMC], namely the right to make the business decision of what construction company [NHMC] would contract with to build the proposed steam plant free from outside pressure wrongfully imposed, with the consent of [NHMC], such consent being induced by the wrongful use of threatened and actual fear, including the threatened and actual fear of economic and financial loss, and under color of official right, in that the defendants threatened that both the county and the city officials would delay the signing of the contracts to supply the solid waste necessary for the fueling of the proposed steam plant unless [NHMC] assured [McDonald] that his company would construct the steam plant.

12/1/88 Indictment Count 1.

they violated the Hobbs Act from November 1983 to May 1, 1984, by using extortion to induce Godwin to cede partial ownership of Area Services to Shaw. Count 3 charged that they violated the Hobbs Act from September 26 to October 1, 1985, by the extortion involving NHMC. At the government's request, the magistrate sealed the indictment under Fed. R. Crim. P. 6(e)(4). Gov't C.A. Br. 4.

On June 30, 1989, a 35-count superseding indictment was returned. Count 1 of the indictment charged petitioner, McDonald, and one other person with conducting the affairs of an enterprise through a pattern of racketeering activity. The predicate racketeering acts charged against petitioner were the substantive Hobbs Act violations charged in the original indictment. Counts 2, 3, and 4 of the superseding indictment corresponded to Counts 1, 2, and 3 of the original indictment. Counts 5 through 35 charged defendants other than petitioner with offenses including mail fraud, obstruction of justice, income tax evasion, and the filing of false corporate tax returns. Gov't C.A. Br. 4-6.

3. Before trial, petitioner moved to dismiss the indictment. He argued that the statute of limitations on Count 3 of the superseding indictment (which was identical to Count 2 of the original indictment) had run while the original indictment was under seal and that he had been prejudiced by the delay in unsealing the indictment. In opposing the motion to dismiss, the government explained that the original indictment was returned on December 1, 1988, because the statute of limitations on one of the substantive Hobbs Act charges would otherwise expire within a few months. The government further explained that it had asked the magistrate to seal that indictment so that it could complete its investigation into tax and fraud offenses that had come to light after the investigation of the Hobbs Act violations was underway. The government

said that the investigation of the tax and fraud offenses was not completed, and the necessary departmental approvals to prosecute the racketeering and tax charges were not obtained, until June 30, 1989, when the superseding indictment was filed. Gov't C.A. Br. 9, 80-82; see also Defs. Mem. Br. in Support of Mot. to Dismiss on the Basis of Delay, etc., 1-3 [hereinafter "Mot. to Dismiss"]; Gov't Resp. to Mot. to Dismiss Exh. A.

After an evidentiary hearing, the district court denied the motion to dismiss the indictment. The court found that the indictment was sealed to allow the government to complete its investigation into tax fraud and tax charges relating to a racketeering prosecution, and the court held that that was a legitimate reason to seal the indictment. The court further found that petitioner failed to show that he had suffered "actual substantial and irreparable prejudice arising from the sealing of the indictment." 1/5/90 Order 1-4.

Petitioner and his co-defendants went to trial in January 1990, and the jury returned its verdict in April 1990. Petitioner was acquitted on the racketeering charge (Count 1) and the substantive Hobbs Act charge involving NHMC (Count 4). He was convicted on the Hobbs Act conspiracy charge (Count 2) and the substantive Hobbs Act charge involving Godwin (Count 3).

4. The court of appeals summarily affirmed petitioner's convictions, finding "no merit to any of the issues [petitioner] present[s] in this appeal." Pet. App. 4.

ARGUMENT

1. Petitioner contends (Pet. 18-26) that the government failed to prove a Hobbs Act violation because it failed to show that petitioner received property or some

other tangible benefit from Godwin or Shaw. Petitioner's understanding of the Act is incorrect.

The Hobbs Act proscribes "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). Despite petitioner's claim that "[t]his case takes the Hobbs Act where it has never gone before" (Pet. 19), it is well established that a person may violate the Hobbs Act without personally receiving the benefits of his or her extortionate conduct. See *United States* v. *Green*, 350 U.S. 415, 420 (1956) ("[E]xtortion as defined in the [Hobbs Act] in no way depends upon having a direct benefit conferred on the person who obtains the property."); *Town of West Hartford* v. *Operation Rescue*, 915 F.2d 92, 101 (2d Cir. 1990) ("There is no requirement that the perpetrator of an extortion receive the benefit of his act."), cert. denied, 113 S. Ct. 66 (1992); *United States* v. *Carlock*, 806 F.2d 535, 553 (5th Cir. 1986) ("Hobbs Act prosecution may lie where the extorted payments are given to third parties"), cert. denied, 480 U.S. 949 (1987); *United States* v. *Lewis*, 797 F.2d 358, 364 (7th Cir. 1986) ("To secure a conviction under the Hobbs Act, the prosecution does not have to show that the defendant acted to receive, either directly or indirectly, the proceeds of his extortion or any benefit therefrom."), cert. denied, 479 U.S. 1093 (1987); *United States* v. *Haimowitz*, 725 F.2d 1561, 1577 (11th Cir.), cert. denied, 469 U.S. 1072 (1984); *United States* v. *Margiotta*, 688 F.2d 108, 133 (2d Cir. 1982) ("A Hobbs Act prosecution may lie where the extorted payments are transferred to third parties, including political allies and political parties, rather than to the public official who has acted under color of official right."), cert. denied, 461 U.S. 913

(1983).[3] Thus, petitioner errs in contending that his extortionate conduct fell outside the Act merely because that conduct caused Godwin to transfer a portion of his company to Shaw, petitioner's close friend, rather than to petitioner himself.

Rejection of petitioner's contention does not mean that "every act of political patronage at every level of government and regardless of motivation" violates the Hobbs Act, as petitioner asserts (Pet. 25). To establish a violation of the Act, the government must prove that a politician has obtained a payment (or other benefit) to which he or she is not entitled, "knowing that the payment [or other benefit] was made in return for official acts." *Evans* v. *United States,* 112 S. Ct. 1881, 1889 (1992). The government made that showing here by proving that petitioner obtained for Shaw a portion of Godwin's company, knowing that Godwin was ceding an interest in his company to Shaw in order to obtain petitioner's approval of Godwin's steam-plant project.

2. Petitioner also contends (Pet. 27) that this case provides a "perfect opportunity" for the Court to decide an issue left open in *McCormick* v. *United States,* 500 U.S. 257, 274 n.10 (1991): whether proof of a "quid pro quo" is

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[3] Accord, *e.g., United States* v. *Cerilli,* 603 F.2d 415, 420 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Frazier,* 560 F.2d 884, 887 (8th Cir. 1977), cert. denied, 435 U.S. 968 (1978); *United States* v. *Trotta,* 525 F.2d 1096, 1098 n.2 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976); *United States* v. *Hyde,* 448 F.2d 815, 843 (5th Cir. 1971), cert. denied, 404 U.S. 1058 (1972); *United States* v. Jacobs, 451 F.2d 530 (5th Cir. 1971), cert. denied, 405 U.S. 955 (1972); *United States* v. *Tropiano,* 418 F.2d 1069, 1075-1076 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970); *United States* v. *Provenzano,* 334 F.2d 678, 686 (3d Cir.) ("it is not necessary to prove that the extortioner himself, directly or indirectly, received the fruits of his extortion or any benefit therefrom"), cert. denied, 379 U.S. 947 (1964).

necessary in every case in which an elected official is charged with violating the Hobbs Act by extorting property "under color of official right."[4] To the contrary, that issue is not properly presented in this case. Petitioner did not raise the "quid pro quo" issue in the district court or in his briefs to the court of appeals. Indeed, petitioner cited this Court's opinion in *McCormick* for the first time in his petition for rehearing in the court of appeals, even though, as he concedes (Pet. 30 n.9), the *McCormick* opinion was issued before the court of appeals in this case heard oral argument. Moreover, petitioner did not cite *McCormick* in his rehearing petition for the proposition that the government's theory of prosecution was legally insufficient for failure to allege a "quid pro quo," or that the district court improperly failed to instruct the jury that it had to find a "quid pro quo" to convict him. Instead, petitioner argued that the evidence failed to show that he was "in cahoots" with Shaw or McDonald. Pet. C.A. Reh'g Pet. 10. Under those circumstances, petitioner may not raise the "quid pro quo" issue in this Court, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), and the district

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[4] In *McCormick*, the Court addressed "the issue of what proof is necessary to show that the receipt of a campaign contribution by an elected official is violative of the Hobbs Act," 500 U.S. at 267 n.5, when it is charged that the official obtained the contribution "under color of official right," *id.* at 266. The Court held that "[t]he receipt of such contributions is * * * vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *Id.* at 273. The Court declined to "decide whether a *quid pro quo* requirement exists in other contexts [not involving campaign contributions], such as when an elected official receives gifts, meals, travel expenses, or other items of value." *Id.* at 274 n.10; see also *id.* at 268-269.

court's jury instructions on the Hobbs Act charges are reviewable only for plain error, see *McCormick*, 500 U.S. at 268 n.6; see generally *United States* v. *Olano*, 113 S. Ct. 1770 (1993) (discussing plain error rule).

The district court did not commit plain error in instructing the jury on the Hobbs Act charges. Because this case did not involve campaign contributions, cf. *McCormick*, *supra*, the government was required under *Evans* v. *United States*, to show only that petitioner "obtained a [benefit] to which he was not entitled, knowing that the [benefit] was made in return for official acts." 112 S. Ct. at 1889. The jury instructions in this case were consistent with *Evans*. The jury was instructed:

> Extortion under color of official right is the wrongful taking by a public officer of money or property not due him or his office * * *. The wrongful use of otherwise valid official power may convert a lawful action into unlawful extortion. So, if a public official misuses his office by threatening to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a threat would constitute extortion even though the official was already duty bound to take or withhold the action in question.

Under that instruction, the jury had to find that petitioner "obtained a [benefit] to which he was not entitled"—*i.e.*, Godwin's transfer to Shaw of an interest in Area Services—"knowing that the [benefit] was made in return for [an] official act[ ]"—*i.e.*, petitioner's approval of Godwin's steam-plant project. *Evans*, 112 S. Ct. at 1889.[5]

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[5] As petitioner observes (Pet. 17), the Eleventh Circuit stated in *United States* v. *Martinez*, 14 F.3d 543, 553 (1994), that *Evans* "adopt[ed] the *quid pro quo* requirement of *McCormick*" for all "official right" cases, and held that jury instructions similar to those given

3. Petitioner next contends (Pet. 31-48) that an indictment may not be sealed in order to toll the statute of limitations and that the government was required to justify the sealing of an indictment when it asked the magistrate to seal it. Every court of appeals that has considered those contentions has rejected them.

Under Fed. R. Crim. P. 6(e)(4), the government may ask that an indictment be sealed for a period that extends beyond the time when the statute of limitations on charges in the indictment would otherwise have run.[6] A magistrate has discretion to grant such a request "for any legitimate prosecutorial objective or where the public interest otherwise requires it." *United States* v. *Richard*, 943 F.2d 115, 118 (1st Cir. 1991). Accord *United States* v. *Sharpe*, 995 F.2d 49, 52 (5th Cir. 1993); *United States* v. *Ramey*, 791 F.2d 317, 320-321 (4th Cir. 1986); *United States* v. *Mitchell*, 769 F.2d 1544 (11th Cir. 1985), cert. denied, 474 U.S. 1066 (1986); *United States* v. *Southland Corp.*, 760 F.2d 1366, 1379-1380 (2d Cir.), cert. denied, 474 U.S. 825 (1985). The sealing of an indictment tolls the statute of

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here were inadequate to convey that requirement. Any tension between the Eleventh Circuit's unpublished decision in this case and its later decision in *Martinez* is for that court to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Moreover, petitioner, unlike the defendant in *Martinez*, did not object in the courts below to the district court's jury instruction on the ground that it failed to require the jury to find a "quid pro quo," and therefore the issue of whether such a requirement exists is not properly presented here.

[6] Rule 6(e)(4) provides:

> The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

limitations. See, *e.g.*, *United States* v. *Sharpe*, 995 F.2d at 51 & n.3 (collecting cases). When the indictment remains sealed beyond the limitations period, the defendant is entitled to dismissal of the indictment only if he or she can show that the delay caused actual, substantial, and irreparable damage. *United States* v. *Sharpe*, 995 F.2d at 51; *United States* v. *Srulowitz*, 819 F.2d 37, 40 (2d Cir.), cert. denied, 484 U.S. 853 (1987); *United States* v. *Edwards*, 777 F.2d 644, 649 (11th Cir. 1985), cert. denied, 475 U.S. 1123 (1986); *United States* v. *Mitchell*, 769 F.2d at 1547; *United States* v. *Muse*, 633 F.2d 1041, 1043 (2d Cir. 1980), cert. denied, 450 U.S. 984 (1981). Under those principles, the sealing of the original indictment against petitioner was proper.

First, the government had a legitimate reason for requesting a sealed indictment. As the government explained at the hearing on petitioner's motion to dismiss the indictment, and as the district court found, the government asked for the sealing of the indictment to permit it to complete its investigation. During the investigation, the government discovered evidence implicating McDonald and others in additional fraud and tax offenses. The government needed to investigate further to decide whether to bring a racketeering prosecution based on the Hobbs Act, tax, and fraud violations. That was plainly a legitimate prosecutorial objective justifying the sealing of the indictment. *United States* v. *Lakin*, 875 F.2d 168, 170-171 (8th Cir. 1989) (need for more time to gather additional evidence to determine whether the case should be pursued is a legitimate prosecutorial objective justifying the sealing of the indictment).

Contrary to petitioner's assertion (Pet. 31-43), the government was not required to explain, before the indictment was unsealed, why it had asked the magistrate to seal

the indictment. Nothing in the text of Fed. R. Crim. P. 6(e)(4) imposes such a requirement. Instead, "it is wholly within the discretion of the Magistrate whether to require the prosecutor to justify a request to seal" when the request is made. *United States* v. *Srulowitz*, 819 F.2d at 41; see also *United States* v. *Sharpe*, 995 F.2d at 52. A magistrate can reasonably decide not to require a justification by the government before the indictment is unsealed, because such a requirement could cause the very disclosure that the sealing is meant to prevent. *United States* v. *Sharpe*, 995 F.2d at 52; *United States* v. *Lakin*, 875 F.2d at 171-172. The courts have recognized that a defendant's interests may be adequately protected by allowing the defendant to challenge the sealing of an indictment, and requiring the government to justify it, after the indictment is unsealed. *United States* v. *Sharpe*, 995 F.2d at 52; *United States* v. *Lakin*, 875 F.2d at 171; *United States* v. *Srulowitz*, 819 F.2d at 40-41. Petitioner has not shown that that procedure was inadequate in this case.

Nor does petitioner provide any basis for further review of the district court's finding that the sealing of the indictment did not cause him "actual substantial and irreparable prejudice." 1/5/90 Order 4. Petitioner has asserted that a "critical" witness, Gurney Owens, suffered a stroke and became unavailable after the original indictment was filed and before the superseding indictment was returned. See Pet. 37-38. Petitioner never made any showing or proffer, however, of what Owens' testimony would have been or how it would have aided his defense. Instead, he merely asserts that he "expected" Owens "to provide exculpatory testimony." Pet. 37; see Pet. C.A. Br. 28-29. That vague assertion is plainly inadequate to establish actual prejudice, especially when in interviews with investigating agents and his grand jury testimony, Owens inculpated petitioner in the crimes charged. Gov't C.A. Br. 83.

4. Petitioner contends (Pet. 58-61) that the district court erred in admitting Godwin's diaries into evidence under Fed. R. Evid. 801(d)(1)(B) to rebut a claim of recent fabrication. That contention does not merit further review.

a. The evidence at trial showed that during 1984 Godwin kept contemporaneous notes of his daily activities on scraps of paper or a desk diary and later transferred the notes to a legal pad for use as a permanent diary. The scraps of paper and the desk diary were marked GEX 27. Godwin gave the government a photocopy of the permanent diary, which was marked GEX 27A. Before trial, defense counsel asked for the original of GEX 27A to test it for authenticity. The government was unable to supply the original, because Godwin claimed he had lost it during a move. The government did, however, give defense counsel the original scraps of paper and desk diary that were GEX 27. Gov't C.A. Br. 117-118.

During direct testimony, Godwin used the diaries to refresh his recollection, often reading directly from them. During cross-examination, defense counsel asked him what had happened to the original of GEX 27A. Defense counsel said that he wanted to test its authenticity, suggesting that it had been fabricated. The government offered GEX 27 into evidence to rebut that charge of recent fabrication. Gov't C.A. Br. 119-120.

During his testimony, petitioner admitted that he had used Godwin's diaries to refresh his recollection in preparation for his trial testimony. Gov't C.A. Br. 118-121.

The district court admitted GEX 27 and GEX 27A into evidence after excising the portions of those exhibits about which there had been no testimony. The court determined that defense counsel had raised a claim that Godwin's testimony and the diaries had been fabricated. The court

also determined that, because of the exhaustive cross-examination on the diaries, no prejudice would result from their admission. The court noted that petitioner had used the diaries to refresh his own recollection. Gov't C.A. Br. 121.

b. The district court acted well within its discretion in admitting into evidence those portions of the diaries as to which there had been testimony. When the diaries were admitted, defense counsel had already extensively cross-examined Godwin about them; thus, their contents had been brought to the jury's attention by petitioner and his co-defendants. Admission of the diaries themselves added nothing new and did not prejudice petitioner. Moreover, because petitioner used the diaries to refresh his own trial testimony, the diaries were admissible under Fed. R. Evid. 612. That Rule provides that if a witness uses a writing to refresh his or her memory for the purpose of testifying, an adverse party is entitled to have introduced into evidence those portions that relate to the witness's testimony.[7]

5. Petitioner further contends (Pet. 48-58) that the district court erred in denying his post-trial motion to interview the jurors and for a hearing on possible jury tampering. That fact-bound contention is without merit.

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[7] This Court need not hold the petition in this case pending disposition of *Tome* v. *United States*, cert. granted, 114 S. Ct. 1048 (1994) (No. 93-6892), as petitioner urges (Pet. 61). *Tome* presents the question whether prior consistent statements offered to rebut a charge of improper influence or motive may be admitted under Fed. R. Evid. 801(d)(1)(B) without a showing that the statements were made before the influence or motive arose. Although petitioner seeks review of a similar issue—by arguing that Godwin's diaries were not admissible under Rule 801(d)(1)(B) because they were prepared after Godwin's motive to fabricate them arose—resolution of that issue would not affect the outcome of this case. As discussed in the text, even if the diaries were not admissible under Rule 801(d)(1)(B), they were admissible under Rule 612, and even if their admission was error, the error was harmless because it caused no prejudice to petitioner.

a. During the trial, juror Clyde Byrd told the court that someone offered him a bribe to influence his verdict and that he had related the incident to juror Mike Etheridge. Byrd assured the court that no one had overheard him tell Etheridge. Although both Byrd and Etheridge told the court that they could put the incident aside, the court excused them from the jury. The court then instructed the remaining jurors that they need not concern themselves about why Byrd and Etheridge had been excused. Gov't C.A. Br. 187-188; 2/5/91 Order 1-6.

At the government's request, the court interviewed the remaining jurors in camera later the same day. The court asked them whether they knew why Etheridge and Byrd had been excused and whether they had overheard the two men's conversation that morning. All of the jurors except one Harper answered no to both questions. Harper said that she did not know why Byrd and Etheridge had been excused but she overheard Etheridge say, "If he didn't have something to hide, he would have revealed it." Harper said that after hearing that remark she moved to the other side of the room. She assured the court that the incident would not affect her deliberations. Harper, who was an alternate juror, did not deliberate. Gov't C.A. Br. 188; 2/5/91 Order 6-7.

At the end of the trial, the court asked the jurors in camera whether they knew of any attempted influence on any of the jurors by any outside source and whether they had been exposed to any publicity about the case. All of them answered no to both questions. Gov't C.A. Br. 188-189.

After trial, petitioner and his co-defendants moved for permission to interview the jurors and for a hearing on whether their right to a fair trial had been affected by jury tampering. In support of the motion, the defendants filed

two affidavits: one by an investigator hired by the lawyer representing McDonald on an obstruction of justice charge stemming from the attempted bribe of juror Byrd; and one by the lawyer who represented McDonald at the trial in this case. The investigator said that he interviewed Etheridge after he was excused from the jury; Etheridge said that, while juror Byrd was being interviewed by the court, other jurors had asked him what was going on, to which Etheridge had replied he knew but could not tell. The investigator further alleged that Etheridge claimed he had telephoned a juror to find out who had been elected foreman, but that the juror told him she was too busy to talk then and never returned his call. McDonald's trial attorney said in his affidavit that after the incident involving Byrd and Etheridge the remaining jurors no longer seemed "friendly and receptive," and that, in his opinion, "this jury knew something was wrong." The district court denied the motion, finding no evidence of prejudice to the defendants from the attempted bribe of Byrd or from Etheridge's attempt to contact a juror after his dismissal. Gov't C.A. Br. 189-190; 2/5/91 Order 10-16.

b. A district court has broad discretion in responding to a claim of jury tampering. The court need not investigate the claim at all if it is insubstantial. *United States* v. *Easter*, 981 F.2d 1549, 1553 (10th Cir. 1992), cert. denied, 113 S. Ct. 2448 (1993); *United States* v. *Jerome*, 942 F.2d 1328, 1332 (9th Cir. 1991) (post-trial affidavit submitted by defendant showed no extraneous influences upon affiant juror's decision to warrant evidentiary hearing); *United States* v. *Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991); *United States* v. *Ayarza-Garcia*, 819 F.2d 1043, 1051 (11th Cir.), cert. denied, 484 U.S. 969 (1987). When the claim is substantial, the court has wide latitude in deciding how to investigate it. *United States* v. *LaSpesa*, 956 F.2d 1027, 1033 (11th Cir. 1992) ("the district court

has broad discretion to choose the inquisitorial tools . . . necessary and appropriate to determine prejudice where juror misconduct or extrinsic influences are alleged") (internal quotation marks omitted); see *United States* v. *Ruggiero,* 928 F.2d 1289, 1301 (2d Cir.), cert. denied, 112 S. Ct. 372 (1991); *United States* v. *Pallais,* 921 F.2d 684, 686 (7th Cir. 1990), cert. denied, 112 S. Ct. 134 (1991); *United States* v. *Chang An-Lo,* 851 F.2d 547, 558 (2d Cir.), cert. denied, 488 U.S. 966 (1988); *United States* v. *Phillips,* 664 F.2d 971, 998-1000 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982).

The district court acted reasonably in responding to the jury-tampering incident in this case. When the court learned that Byrd had been offered a bribe and had told Etheridge about it, the court excused them from the jury. The court then questioned the remaining jurors to ensure, as Byrd had asserted, that none of them had learned of the bribe attempt. The court questioned the jurors again at the end of the trial to make sure that they had not been subjected to any extrinsic influence.

Nothing in the post-trial affidavits filed by petitioner and his co-defendants warranted additional inquiry. The affidavit of the investigator indicated that some jurors asked Etheridge why Byrd was being interviewed by the court and that Etheridge did not tell them. The affidavit thus suggested that the jury did not know that someone had attempted to bribe Byrd, and it confirmed that they did not find out about the bribe attempt from Etheridge. The investigator's affidavit also related that Etheridge telephoned one of the jurors to find out who had been elected foreman. It is not clear from the affidavit whether the telephone call occurred while the jury was deliberating or after it had returned its verdict. In any event, it is clear that the telephone call did not result in any prejudicial contact, since the juror told Etheridge that she was too

busy to talk and did not call him back. Finally, the affidavit of McDonald's trial attorney offered only his impression that the remaining jurors were no longer "friendly and receptive" after Byrd and Etheridge were excused and his speculation that they "knew something was wrong." The district court did not abuse its discretion in declining to investigate further.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

LAMBERT C. MIMS,
Petitioner,

–against–

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I. THIS CASE PRESENTS TWO IMPORTANT ISSUES CONCERNING THE SCOPE OF THE "OFFICIAL RIGHT" PRONG OF THE HOBBS ACT

1. Under the interpretation of the Hobbs Act that was applied in this case, Lambert C. Mims committed extortion "under color of official right" because Charles Shaw obtained "property" from Gerald Godwin, even though Mims never "induced" a payment from Godwin or Shaw and never himself "obtained" a benefit, and even though the government never demonstrated that Mims' actions were motivated by anything but the best interests of the City of Mobile. This, we submit, is a radical extension of the Hobbs Act that places government employees at risk for what is generally considered "normal" or "appropriate" governmental conduct.

The government concedes that Mims did not "obtain property" or receive any benefit from the alleged extortion involving the steam plant proposal.

(Gov't. at 7-8) It argues, however, that Mims nevertheless committed extortion because co-defendant Charles Shaw "obtained" a portion of Gerald Godwin's company.[1]

Given the broad interpretation of "property" under the Hobbs Act,[2] were

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[1] Significantly, the government's "Statement" does not point to testimony by Godwin or anyone else that Mims said or did anything that would lead Godwin to believe that Mims would not consider his proposal unless he transferred an interest in his company to Shaw. Nor does the government refer to any evidence suggesting that Shaw told Godwin that if he did not make such a transfer, Mims would not approve of his proposal. The government, however, does take liberty with the facts. For example, there was no evidence that Shaw was a "business associate" of Mims, (Gov't at 3), and the pages of the government's Brief to the Court of Appeals to which the government adverts do not support that claim. Moreover, although the government now suggests otherwise, as it conceded in its appellate brief (at p. 16), an independent engineering firm determined that Shaw's company, and not Godwin's, had submitted the most attractive proposal.

[2] "Property" under the Hobbs Act is broadly construed to include any "valuable right," including the right to solicit or obtain business. United

the rule applied in this case to survive, whenever a government official determines that a government contract should be awarded to two of the bidders working together, since each bidder is losing out on having the entire contract and has thus been deprived of "property," the government official is guilty of extortion "under color of official right," regardless of his motive and regardless of whether he benefitted from his official act.

The government makes no attempt to respond to Mims' claim that interpreting the Hobbs Act in this fashion is a dangerous precedent that can lead to federal prosecutions of

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States v. Tropiano, 418 F.2d 1069, 1075 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970) See also United States v. Debs, 949 F.2d 199 (6th Cir. 1991), cert. denied, 112 S.Ct. 2945 (1992) (property includes intangible rights under labor statutes to participate in union elections); United States v. Zemek, 634 F.2d 1159 (9th Cir. 1980), cert. denied, 450 U.S. 916 (1981), (includes right to solicit business).

state and local officials who, for totally legitimate reasons, have awarded government business to one person to the detriment of another. Instead, the government cites to a number of cases in which the courts have stated, generally in passing, that the Hobbs Act can be violated, even if the defendant has not personally received the benefits of his act, provided, of course, that, unlike here, there is a link between the defendant and the extortionate conduct.

In most of the cases, the language the government highlights was mere dictum, either because the case involved another issue, see, e.g., Town of West Hartford v. Operation Rescue, 915 F.2d 92 (2d Cir. 1990), cert. denied, 114 S.Ct. 185 (1993) (no civil RICO claim stated since no property obtained as result of alleged Hobbs Act violations), or because the defendant

benefitted, or attempted to benefit, albeit, in some cases indirectly, from the extortionate scheme. See United States v. Haimowitz, 725 F.2d 1561 (2d Cir.), cert. denied, 469 U.S. 1072 (1984) (government official received a portion of the payment); United States v. Lewis, 797 F.2d 358 (7th Cir. 1986), cert. denied, 479 U.S. 1093 (1987) (defendant engaged in scheme for revenge in order to humiliate another); United States v. Cerilli, 603 F.2d 415 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980) (requiring payment to be made to defendant's party's political committee); United States v. Trotta, 525 F.2d 1096 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976) (same).

Moreover, most of the cases involve extortion "induced by wrongful use of actual or threatened force, violence or fear," and not extortion "under color of official right." See,

e.g., United States v. Green, 350 U.S. 415 (1956) (involving threats by union officials in order to secure jobs for union workers); United States v. Carlock, 806 F.2d 535 (5th Cir. 1986), cert. denied, 480 U.S. 949 (1987) (threats by union officials); United States v. Frazier, 560 F.2d 884 (8th Cir. 1977), cert. denied, 435 U.S. 968 (1978) (defendant attempted to extort money from bank president by attaching explosives to his belt).

This is an important distinction. In "threat of force" cases there is a clear impropriety, whereas in "official right" cases, the official can commit the crime even if he does not actually "induce" the payment simply by virtue of his status. Evans v. United States, 112 S.Ct. 1881 (1992). As a result, as this case amply demonstrates, official conduct that is passive or equivocal can be deemed a crime.

Requiring that a governmental official receive some benefit, however intangible or indirect, in exchange for taking or refusing to take an official act, assures that the customary political conduct of local officials is not treated as a serious federal offense. Whether the Hobbs Act incorporates such a requirement is an important issue deserving of this Court's review.

2. This case also presents an opportunity for this Court to decide the question left open in McCormick v. United States, 500 U.S. 257 (1991): that is, must the government prove a "quid pro quo" when it alleges extortion "under color of official right," even when the property obtained is not a campaign contribution.

The government concedes that the Eleventh Circuit held in United States v. Martinez, 14 F.2d 543 (11th Cir.

1994), that a "quid pro quo" is an essential element of the crime of extortion in all "official right" cases. (Gov't. at 11, n.5)[3] It argues, however, that even though it did not prove that Godwin transferred an interest in his company to Shaw in exchange for Mims' promise to award him the steam plant contract, Mims cannot raise the "quid pro quo" issue because he did not raise it in the district court or, initially, in the Court of Appeals. (Gov't. at 10) What the government does not say is that McCormick was decided after this case was submitted to the jury. Moreover, when Mims submitted his brief to the Court of Appeals, Martinez had not yet been decided. Indeed, before Martinez,

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[3] Martinez applies to Mims since a decision that defines what conduct falls within the proscription of a criminal statute is entitled to retroactive effect. See, e.g., Belt v. United States, 863 F.2d 1208, 1211 n.2 (11th Cir. 1989).

the Eleventh Circuit had suggested that McCormick would be limited to cases involving campaign contributions. United States v. Davis, 967 F.2d 516, 521 (11th Cir. 1992).

Thus, it was only after the Eleventh Circuit explicitly held in Martinez that a "quid pro quo" was required in all "official right" Hobbs Act cases, that Mims had reason to raise the "quid pro quo" issue, and he argued the McCormick-Evans-Martinez rulings in his petition for rehearing to the Eleventh Circuit.

The government, while on the one hand faulting Mims for failing to anticipate McCormick and Martinez, argues that, on the other hand, the district court did not commit "plain error" in failing to anticipate McCormick and Martinez and instruct the jury about the need for a "quid pro quo." (Gov't. at 11)

The government cannot have it both ways. Whether or not a public official has committed the federal crime of extortion "under color of official right," absent evidence of a "quid pro quo," is an issue fairly presented by this Petition and one this Court must resolve.

II. THIS COURT SHOULD CORRECT A CLEAR MISINTERPRETATION OF RULE 6(e)(4) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The procedure that has developed in the courts below -- and that was applied in this case -- in disregard of Rule 6(e)(4) of the Federal Rules of Criminal Procedure, gives the government virtually unfettered power to obtain a sealed indictment, without advance review by a magistrate, for the sole purpose of tolling the statute of limitations. (Pet. at 31-47) Moreover, if the defendant, like Mims here, later attempts to challenge the sealing, the magistrate's ministerial

decision to permit the sealing, made without any facts or argument about why the sealing was sought, is accorded "great deference."

The government makes no independent effort to justify this procedure, instead citing to the lower court decisions which have approved of the process used in this case. But the fact that the lower courts have consistently misread Rule 6(e)(4) does not mean that this Court is powerless to act. This Court can and has stepped in to rectify even a unanimous misreading of a federal statute. See, e.g., McNally v. United States, 483 U.S. 350 (1987) (rejecting uniform misreading of mail fraud statute by lower courts); General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (rejecting conclusion of all circuit courts that Title VII prohibited discrimination on the basis of pregnancy).

The Court should do so here. In promulgating Rule 6(e)(4), Congress determined that the power to seal an indictment belongs to the judiciary branch of the government. The lower courts have simply ignored this mandate, and, in violation of the doctrine of Separation of Powers, have shifted that power from the judiciary to the Executive.

The Court's intervention is particularly important here because, as the government admits, it sealed the indictment against Mims, without any advance review by the magistrate, for the purpose of tolling the statute of limitations while it continued its unrelated investigation of co-defendant McDonald. (Gov't. at 6) The government argues that that was "legitimate" since it was considering a RICO charge. (Gov't. at 13) But in the sealed indictment the government had

already charged Mims with three Hobbs Act violations, which were sufficient to make out a RICO claim against Mims. In fact, those same three Hobbs Act violations were the only predicate acts that were later alleged against Mims in the superseding indictment -- an indictment that contained an additional thirty counts against defendants other than Mims. In short, the continuing investigation of McDonald had nothing to do with Mims, and the government's ill-disguised efforts to postpone its case against Mims so it could later link Mims with McDonald's unrelated and massive wrongdoing can hardly be considered "legitimate."

The misreading of Rule 6(e)(4) by the lower courts has resulted in a process in which the magistrate's role in the sealing decision is first reduced to a ministerial act and then awarded "great discretion." This Court

should grant review to correct the misinterpretation of Rule 6(e)(4).

III. THIS COURT SHOULD SET STANDARDS FOR DETERMINING WHEN A COURT MUST PERMIT POST-VERDICT COMMUNICATIONS WITH THE JURORS

This case calls into question the propriety of rules that prohibit post-verdict questioning of the jurors to determine whether external influences adversely affected the deliberative process. (Pet. at 45-58) The government has completely skirted the issue actually raised by Mims, which concerns the proper application of rules such as Local Rule 12 of the Local Rules of the Southern District of Alabama, and instead defends the District Court's actions both during the trial, when it learned of the attempt to bribe a juror by an employee of co-defendant McDonald, and after the trial, when it refused to grant an evidentiary hearing.

The issue here is not whether the District Court acted appropriately in those instances, but, rather, whether rules, such as Local Rule 12, can legitimately prohibit post-trial efforts by the defendant to discover whether his trial was tainted by a "presumptively prejudicial" jury tampering incident. Remmer v. United States, 347 U.S. 227, 229 (1954).

During the trial, the trial judge candidly recognized that the reason for the excusal of two jurors "was liable to become public knowledge" because "things have an amazing way of getting out." (R. 6386). Yet Mims was precluded from conducting any post-trial investigation to determine whether the judge's prediction had become a reality. Had Mims or his counsel been allowed to speak to the jurors after trial, they might well have learned that the jurors had

learned of the bribery attempt, and that this highly prejudicial information had adversely impacted on their deliberations.

Rules that prohibit post-verdict communications with the jurors plainly implicate a defendant's First and Sixth Amendment rights to free speech and a fair trial. There are presently no uniform standards to assist a court in determining when such communications must be allowed. This important issue plainly merits this Court's review.

IV. THIS CASE SHOULD BE REMANDED TO THE ELEVENTH CIRCUIT IF THE COURT DECIDES IN TOME v. UNITED STATES THAT PRIOR CONSISTENT STATEMENTS ARE NOT ADMISSIBLE IF MADE AFTER THE MOTIVE TO FABRICATE ARISES

The government admits that Godwin's "diaries" were admitted at trial pursuant to Rule 801(d)(1)(B) of the Federal Rules of Evidence to rebut a charge of recent fabrication. (Gov't. at 15) The government also admits that in Tome v. United States,

cert granted, 114 S.Ct. 1048 (1994) (No. 93-6892), this Court has undertaken to review the interpretation of that Rule that was applied in this case -- an interpretation which permits introduction of prior consistent statements to rebut a charge of fabrication even if the statement was made after the motive to fabricate arose. (Gov't. at 16, n.7)

Nevertheless, the government argues that this Court should reject Mims' request that his case be remanded to the Eleventh Circuit if, in Tome, this Court rejects the reading of Rule 801(d)(1)(B) applied here, because, according to the government, Godwin's "diaries" would have been admissible under Rule 612 of the Federal Rules of Evidence to "refresh his memory," and because, according to the government, their admission into evidence was in any event harmless.

First, the "diaries" were not, and could not be, admitted pursuant to Rule 612. The Rule provides, in pertinent part, that:

> if a witness uses a writing to refresh memory for the purpose of testifying ...
>
> an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

F.R.E. 612 (emphasis added).

The Rule is clear. The writing is admissible at the request of the "adverse party." In other words, "Rule 612 confers upon opposing counsel the absolute right to ... introduce into evidence for the purposes of impeachment those portions which relate to the testimony of the witness." Graham, Handbook of Federal Evidence §612.2 at 563 (3d ed. 1991) (emphasis added). The government's claim that Rule 612 authorized it to introduce

into evidence the self-serving writings of its own witness is disingenuous in the extreme.

Second, the government's attempt to downplay the importance of Godwin's "diaries" by invoking the words "harmless error" is highly inappropriate. Godwin was the government's key witness and his "diaries," which played a significant role in the government's summation, were critical evidence relied on by the government to establish when certain events purportedly took place. Moreover, the Eleventh Circuit never addressed whether introduction of the "diaries" was harmless. Rather, the court, without opinion, affirmed the decision below because it followed Eleventh Circuit precedent permitting admission of prior consistent statements made after the motive to fabricate arose.

The self-serving Godwin "diaries" were admitted into evidence pursuant to an interpretation of Rule 801(d)(1)(B) that this Court may reject. If it does, then the Godwin "diaries" were improperly admitted, and this case should be remanded to the Eleventh Circuit for rebriefing and reconsideration of this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 93-1805

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

LAMBERT C. MIMS,
Petitioner,

–against–

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF

Petitioner Lambert C. Mims ("Mims") files this Supplemental Brief in Support of his Petition for a Writ of Certiorari, pursuant to Rule 15.7 of the Rules of this Court, to refer the Court to United States v. Davis, No. 90-7108 (11th Cir., Aug. 9, 1994), a very recent decision by the Court of Appeals for the Eleventh Circuit that is pertinent to one of the issues raised in the Petition.

In his Petition, Mims raised the question of whether the "quid pro quo" requirement for an "official right" Hobbs Act violation, established by this Court in McCormick v. United States, 500 U.S. 257 (1991), applies outside of the campaign contribution context. In response to the government's claim that Mims waived this issue because he did not raise it at trial, or, initially, before the

Court of Appeals, Mims pointed out that he expressly raised the issue to the Eleventh Circuit by way of a petition for rehearing. He further argued that that sufficiently preserved the issue since McCormick was decided after his case was submitted to the jury and since, at the time his case was initially submitted to the Eleventh Circuit, that Court had suggested, in United States v. Davis, 967 F.2d 516 (11th Cir. 1992), that McCormick would be limited to cases involving campaign contributions.

On August 9, 1994, the Eleventh Circuit granted a petition for rehearing in United States v. Davis, the case cited in Mims' Reply, and reversed the defendant's conviction on the ground that his jury was not properly instructed on the quid pro quo requirement. (A copy of the decision is attached as an appendix hereto as

A-1) This is precisely the issue the Eleventh Circuit refused to reconsider in Mims' case.

The Eleventh Circuit's decision on rehearing in Davis illustrates that Mims' was correct in believing that a Petition for Rehearing is the appropriate vehicle for bringing to the Court's attention an intervening change in the law -- in this case, the Eleventh Circuit's decision in United States v. Martinez, 14 F.3d 543 (11th Cir. 1994), holding that a quid pro quo is required in all Hobbs Act "official right" cases. In Davis, the Eleventh Circuit on rehearing considered that very intervening change in the law and granted the very same relief it denied to Mims.

Moreover, Davis highlights the necessity for a remand to the Eleventh Circuit since it is now clear that Mims stands convicted for conduct that the

Eleventh Circuit has reaffirmed is not criminal under the Hobbs Act.

CONCLUSION

For the foregoing reason, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: August 17, 1994
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APPENDIX

PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-7108

D.C. Docket No. CR-89-H-222-8

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG -9 1994
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CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PATRICIA DAVIS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Alabama

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(August 9, 1994)

ON PETITION FOR REHEARING

Before KRAVITCH and EDMONDSON, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

We previously affirmed appellant Davis's conviction on charges of violating the Hobbs Act, 18 U.S.C. §1951, and reversed and remanded on a sentencing matter. 967 F.2d 516 (11th Cir. 1992). Davis has moved for rehearing on a single issue: whether, to establish Hobbs Act extortion, the government must prove that the defendant explicitly promised to take or refrain from some action in consideration of the allegedly illegal payment received; in other words, whether the government must prove a specific quid pro quo (and, more particularly, whether the jury must be charged on the specific-quid pro quo element).

The petition is granted. For the reasons stated in United States v. Martinez, 14 F.3d 543, 552-554 (11th

Cir. 1994), under United States Supreme Court precedent,[1] an explicit promise by a public official to act or not act is an essential element of Hobbs Act extortion, and the defendant is entitled to a reasonably clear jury instruction to that effect. See also United States v. Allen, 10 F.3d 405, 411 (7th Cir. 1993); United States v. Farley, 2 F.3d 645, 651 (6th Cir.), cert. denied, __ U.S. __, 114 S.Ct. 649, 126 L.Ed.2d 607 (1993); United States v. Garcia, 992 F.2d 409, 414 (2d Cir. 1993); United States v. Taylor, 993 F.2d 382, 384 (4th Cir.), cert. denied, __ U.S. __, 114 S.Ct. 249, 126 L.Ed.2d 202 (1993). Because the district court failed to charge Davis's jury as to the necessity of finding an

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[1] Evans v. United States, __ U.S. --, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992); McCormick v. United States, 500 U.S. 257, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991).

explicit promise before the jury properly could convict -- and indeed informed the jury that "a specific quid pro quo is not always necessary for a public official to be guilty of extortion" -- appellant's conviction is due to be REVERSED and the case REMANDED to the district court for further proceedings consistent with this opinion.

SO ORDERED.